GTE Automatic Electric Incorporated *and* Office and Professional Employees International Union, Local 28, AFL-CIO. Case 13-CA-17139

May 28, 1982

SUPPLEMENTAL DECISION AND ORDER

On January 26, 1979, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding, finding that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act, and, *inter alia*, ordering Respondent to cease and desist from (1) announcing and misrepresenting to its employees that the "General Telephone & Electronics Corporation Savings & Investment Plan," herein called the Plan, is available only to salaried nonunion employees, and (2) refusing to bargain collectively concerning the Plan and related matters with the Union as the exclusive bargaining representative of the employees in the appropriate unit. The Board then sought enforcement of its Order in the United States Court of Appeals for the Seventh Circuit. Thereafter, in June 1979, the court granted the Board's motion for leave to withdraw, without prejudice, its application for enforcement of its Order, and remanded the proceeding to the Board for reconsideration.

On July 2 and 17, 1979, the Board notified the parties of the court's action; informed them that the Board had decided to reconsider the issue of whether a wrap-up (or zipper) clause, by itself, constitutes a waiver of the Union's right to bargain during the term of the contract concerning matters not specifically covered by the contract; and advised them that they could submit statements of position to the Board with respect to this issue. Such statements were received from Respondent and the General Counsel.

The Board has reconsidered its Decision in light of the entire record and the statements of position and has decided to affirm its previous Decision and Order, as modified below.

Since at least 1960, the Union has been a party to a series of collective-bargaining contracts with Respondent which have contained the following zipper clause:

> Article 14—Waiver
>
> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Prior to the execution of their latest 3-year bargaining agreement in April 1976, Respondent and the Union agreed to include the clause therein without discussion, and, because the Plan had neither existed nor been contemplated at that time, did not discuss the Plan or any other similar benefit. In the fall of 1977, Respondent announced its intention to, and did, implement the Plan for its nonunion salaried employees but, citing the zipper clause, rejected the Union's request to bargain concerning the inclusion of the union employees in the Plan.

In our initial Decision, we found that, during the term of the contract, Respondent was obligated to bargain about matters not specifically covered in the contract or unequivocally waived by the Union, and that the contractual zipper clause in issue did not constitute a waiver because the benefit involved was neither in existence nor proposed at the time and, therefore, could not have been waived.

Upon reconsideration of the issue, we find that Respondent may rely on the waiver contained in its contractual zipper clause,[2] and that said clause clearly and unequivocally covers the Union's request to bargain concerning the implementation of a new benefit. Therefore, because the implementation of the plan benefiting the nonunion employees does not constitute a unilateral change of existing working conditions and because the bargaining history is completely silent on the matter in issue, Respondent lawfully may refuse to enter into midterm negotiations concerning the matter. We are of the opinion that, by permitting Respondent to invoke the zipper clause as a shield against the Union's

[1] 240 NLRB 297.

[2] *The Jacobs Manufacturing Company*, 94 NLRB 1214 (1957), enfd. 196 F.2d 680 (2d Cir. 1952).

midterm demand for bargaining over a new benefit, and by giving literal effect to the parties' waiver of their bargaining rights, industrial peace and collective-bargaining stability will be promoted.[3]

In so concluding we emphasize that Respondent seeks only to maintain the status quo regarding the terms and conditions of employment of unit employees. Significantly, Respondent has not made unilateral changes that directly and adversely affect unit employees, with an accompanying effect of undermining and derogating the Union. Rather, by relying on the zipper clause for its refusal to discuss new subjects during the contract term,[4] Respondent attempts nothing more than to have it and the Union adhere to, and not alter, their contractual commitments and the existing employment conditions.

By construing the contractual zipper clause to justify Respondent's actions, we hold only that the Union has waived its right to require Respondent to bargain midterm about a new subject matter not specifically covered by the terms of the existing contract. Certainly, our decision properly adds and accords stability and dignity to the parties' collective-bargaining relationship and the contract negotiated therefrom.

Accordingly, our original findings are amended as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby amends its original Decision and Order in this proceeding and orders that the Respondent, GTE Automatic Electric Incorporated, Northlake, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Order (240 NLRB 297), as amended below:

1. Delete paragraphs 1(b) and 2(b) and reletter the remaining paragraphs accordingly.

2. Substitute the attached notice for the original one.

MEMBER JENKINS, dissenting in part:

I would reaffirm our previous conclusion that the waiver provision in article 14 did not result in the Union waiving its right to bargain about the implementation of the Plan for unit employees during the term of the then-current bargaining agreement.

In prior Decisions, the Board has considered an employer's bargaining obligations and the conditions necessary which would privilege the withholding from organized employees benefits granted to unorganized employees. We have uniformly held that an employer may withhold such benefits from organized employees only in the context of good-faith bargaining and in the absence of proof of any unlawful motive.[5] Under these circumstances the employer may agree to vary benefits between represented and unrepresented employees, or withhold increases pending a finalized agreement. In either event the employees' Section 7 right to have their representative act as their collective-bargaining agent is upheld. This situation is to be contrasted with that involved here, where an employer refuses to bargain about such benefits for represented employees while simultaneously granting them to unrepresented employees. In such cases the Board previously has found such conduct unlawful.[6]

In the present case, the Board has given effect to a zipper clause so that Respondent may both refuse to bargain about such benefits for represented employees and grant them to unrepresented employees. Respondent contends that the zipper clause was the product of good-faith negotiations as a result of which the Union waived all its rights to midcontract negotiations. Although the Board has been divided on occasion as to the effect to be given such clauses, there has been no dispute that such clauses are to be given no effect where their application would be repugnant to the basic policies of our Act.[7]

In this case I find that Respondent's application of this clause to the present situation oversteps employees' Section 7 rights to such an extent that it is repugnant to the basic policies of our Act and the Board should decline to give it such effect. Respondent's contention that the zipper clause releases it from any and all mid-contract bargaining

[3] Our holding does not disturb cases involving (1) a party's waiver or lack of waiver of its right to bargain over specific matters during a contract term because of the negotiating history and surrounding circumstances (see, e.g., *Proctor Manufacturing Corporation*, 131 NLRB 1166 (1961); *Unit Drop Forge Division Eaton Yale & Towne Inc.*, 171 NLRB 600 (1968), enfd. in relevant part 412 F.2d 108 (7th Cir. 1969)); (2) a party engaging in deceptive conduct during negotiations, so that there is no conscious or knowing waiver of rights (see, e.g., *Conval-Ohio, Inc.*, 202 NLRB 85 (1973)); or (3) an employer unilaterally changing the employees' existing working conditions, then using the zipper clause as a "sword" to justify its refusal to discuss the unilateral changes made to the status quo (see, e.g., *Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc.*, 241 NLRB 869 (1979)). Chairman Van de Water finds it unnecessary to and does not rely on either the *Eaton Yale & Towne* case, *supra*, or the *Pepsi-Cola* case cited herein.

[4] Member Fanning would find that, absent the contractual zipper clause, Respondent would have been obligated to bargain in good faith with the Union regarding the Plan conferred on nonunit employees. See, e.g., *Empire Pacific Industries, Inc.*, 257 NLRB 1425 (1981); *The B. F. Goodrich Company*, 195 NLRB 914 (1972).

[5] See *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135, 1137 (1980); *Chevron Oil Company, Standard Oil Company of Texas Division*, 182 NLRB 445, 449 (1970), enforcement denied 442 F.2d 1067 (5th Cir. 1971); *Shell Oil Company, Incorporated, etc.*, 77 NLRB 1306 (1948).

[6] See *L. M. Berry and Company*, 254 NLRB 42 (1981); *The B. F. Goodrich Company*, 195 NLRB 914, 915 (1972).

[7] See, for example, *Radioear Corporation*, 214 NLRB 362, 364 (1974).

obligations in this situation clearly includes as a corollary the contention that it be allowed to engage in discriminatory misconduct.[8] Here, Respondent has accorded a substantial companywide benefit to unrepresented employees and denied it to represented employees. The assertion of waiver, rather than occurring in the requisite *context* of collective bargaining, as set forth above, was applied in the exact opposite context—a specific, contemporaneous refusal to engage in collective bargaining.

I find no merit in Respondent's reliance on the bargaining which preceded the execution of the current bargaining agreement. The Plan was not discussed during those negotiations, was not contemplated at the time, and, given that the Plan originated from Respondent's parent corporation and was made available to over 40 subsidiaries such as Respondent, was not even a matter fully within Respondent's control.[9] As a result the bargaining history is silent as to the represented employees' participation or nonparticipation in the Plan.

In view of the above, I conclude that Respondent's interpretation of the zipper clause is inherently destructive of employees' Section 7 rights, particularly of the right not to be subject to disparate treatment due to union activity and the right to bargain collectively. See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and the cases cited in footnote 5, above. For this reason I would refuse to give the clause the effect of releasing Respondent from the obligation to bargain over the Plan. Respondent's misconduct is made particularly offensive as a result of its announcement, here found unlawful, that the Plan was being made available only to Respondent's nonunion salaried employees.

[8] In reaching this conclusion I note that in several of the Decisions cited above the conduct described was found also to be violative of Sec. 8(a)(3) of the Act. See *L. M. Berry and Company, supra; Chevron Oil Company, supra.* In the present proceeding, however, the General Counsel has not included in the complaint nor sought to litigate an allegation of 8(a)(3) misconduct.

[9] Despite statements to the contrary in the announcement, the parent corporation in fact imposed no restriction on Respondent with respect to the inclusion of represented employees in such Plan pursuant to collective bargaining. See *GTE Automatic*, 240 NLRB at 298.

The majority's conclusory assertion that its position aids industrial peace and collective-bargaining stability and that Respondent should be allowed to maintain the "status quo" is sophistry. Collective-bargaining stability is not enhanced by allowing a party to refuse to engage in collective bargaining. Industrial peace is not achieved by permitting a discriminatory status quo. If the policies of the Act are to be furthered, Respondent should be allowed to deny represented employees benefits granted others only pursuant to good-faith collective bargaining.[10]

[10] In view of the above analysis, I find it unnecessary to comment on the extent to which art. 14 otherwise might be given effect as a waiver of bargaining rights.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT announce and misrepresent to our employees that participation in our General Telephone & Electronics Corporation Savings & Investment Plan is available only to salaried nonunion employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL correct our documents and inform our employees that employees represented by a labor organization or union may be eligible for the General Telephone & Electronics Corporation Savings & Investment Plan if a collective-bargaining agreement provides for the participation of such employees.

GTE AUTOMATIC ELECTRIC INCORPORATED